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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/444,660	11/22/1999	EDWARD J. PETRUS		8939

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EDWARD J PETRUS
3413 SPANISH OAK DR
AUSTIN, TX 78731

EXAMINER

PORTER, RACHEL L

ART UNIT	PAPER NUMBER
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3626

DATE MAILED: 09/11/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/444,660

Applicant(s)

PETRUS, EDWARD J.

Examiner

Rachel L. Porter

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 11 June 2002 and 24 June 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 June 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☒ Interview Summary (PTO-413) Paper No(s). 7.
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____. 6) ☐ Other: _____.

DETAILED ACTION

Notice to Applicant

1. Claims 1-5 remain pending. Claims 6-10 have been cancelled due to the amendments filed on 6/11/02 and 6/24/02.

Specification

2. The objection to the title of the invention as not descriptive is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.
3. The objection to the disclosure because of placement of the prior art is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.
4. The objection to the disclosure because of the conflicting explanation of the entry of the laboratory studies in claimed process is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.
5. The objection to the disclosure because of the "Brief Summary of the Invention" is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.
6. The objection to the abstract of the disclosure because of language and format issues is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.
7. The amendment to the abstract of the disclosure is objected as failing to comply with 37 C.F.R. 1.121 (b)(1)(iii) which states the following:

(iii) Another version of any replacement paragraph(s), on one or more pages separate from the amendment, marked up to show all the changes relative to the previous version of the paragraph(s). The changes may be shown by brackets (for deleted matter) or underlining (for added matter), or by any equivalent marking system. A marked up version does not have to be supplied for an added paragraph or a deleted paragraph as it is

sufficient to state that a particular paragraph has been added, or deleted.

The marked-up version of abstract does not accurately reflect all changes/deletions made to the original abstract. For instance, in line 1, the word "provides" has replaced the original phrase "relates to". Also, in lines 4-6, the phrase "optionally adding information provided by physical examination and laboratory studies" which was in the original abstract is not included and bracketed in the marked-up version of the amended abstract. Correction is required.

Drawings

8. The objection to the drawings is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.

Claim Objections

9. The objection to claims 6-10 under 37 CFR 1.75 as being a substantial duplicate of claims 1-5 is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.

Claim Rejections - 35 USC § 112

10. Claims 2-3 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In reference to claims 2-3, the present claims are vague and indefinite. The Examiner acknowledges Applicant's attempts to clarify how the steps in claims 2-3 relate to the method recited in claim 1 in the "Remarks" section of the amendment filed

6/11/02. (page 5, lines 10-15) However, the current claim language fails to overcome the 112, 2nd paragraph rejection of claims provided in the prior Office Action. (Paper No. 3) It is still unclear where these steps fit into the method recited in claim 1.

For instance, at what stage in the method is the information in claims 2-3 (information from physical examinations and laboratory studies) added? (i.e. before, during or after the step of completing the questionnaire; before, during or after the step of comparing the questionnaire information to an optimal health profile; before, during or after the step of adjusting for differences, or before, during or after the step of generating the dietary supplement profile?)

The Examiner suggests that limitations explained in the "Remarks" section be included in the claim language. For instance, if the information from physical examinations and laboratory studies is added to the health questionnaire information before generating the dietary supplement profile, the Examiner suggests: "The method of claim 1, wherein step (b) comprises: comparing the questionnaire information by the individual and information provided by a physical examination tohealth profile in a computer database. . ." or similar language for claim 2. A similar analysis may be applied to claim 3.

The rejection of claims 1,4-5 and 6-10 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is hereby withdrawn due to the amendments filed on 6/11/02 and 6/24/02.

NOTE: In light of the 112 2nd problems, the examiner is interpreting the claims and applying prior art as best as possible using these interpretations. These interpretations of claim language are for examination purposes only.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 1-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Summerell et al (U.S. Patent No. 5,937,387) in view of Riley (U.S. Patent No. 5,976,568)

In reference to claim 1, Summerell et al teach a method for creating a dietary supplement profile for an individual comprising:

- completing a health questionnaire by an individual; (Figures 4-6; col. 9, lines 15-31)
- comparing the information gathered from the questionnaire to health standard information (col. 11, lines 18-29)
- generating a dietary supplement profile based on the individual's health information (Figures 18-25)

Summerell et al teach a method and system for providing a dietary supplement profile for an individual in which information from an individual's questionnaire is compared to

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health standard information based on individuals of comparable age, gender and health risks. (col. 11, lines 18-29) Summerell does not specifically teach that the health standard information (i.e. risk factor data) to which individual's questionnaire information is compared includes standards required for optimal health (i.e. the recited "optimal health profile stored in a database") but Summerell does disclose a wellness factor array scale that outlines optimal physiological ages that can be achieved with consumption of "optimal levels" of certain nutrients and various other health factors. (Table 1) At the time of the Applicant's invention, it would have been obvious to one of ordinary skill in the art to modify the system/method of Summerell to compare the individual's questionnaire information to standards that help the individual attain optimal health and to store the optimal health data (i.e. the optimal health profile) in a database. As suggested by Summerell, one would have been motivated to do this to facilitate data retrieval and health data comparisons and to better assist the user in setting and progressing toward tailored fitness goals that improve overall wellness. (col. 6, lines 36-52)

Summerell teaches a system/method that obtains individual health data and compares this data to health standard information as explained above. Summerell also discloses a system/method for generating a physiological age for an individual and providing a listing a nutritional/dietary supplements and suggested adjustments to lifestyle habits based on the system's comparison to health standard information. It is unclear if the system/method of Summerell adjusts for differences between the

individual's health information when compared to an *optimal* health profile then generates a dietary supplement profile suggested for an *optimal* health profile.

Rilely teaches a method that adjusts for differences in the individual's health profile compared to an optimal health profile and generates a dietary supplement profile based on the individual's health information. (col. 7, line 33-col. 8, line 9; col. 17, lines 30-40, col. 21, lines 35-40). The Examiner submits that the presence of the "optimal health profile" for comparison is readily apparent in the method of Riley since the dietary supplement formulations are optimized for each gender and for individuals with various lifestyle factors. At the time of the Applicant's invention, it would have been obvious to one of ordinary skill in the art to modify the method/system of Summerell with the teaching of Riley. As suggested by Summerell, one would have been motivated to do this to provide options that are user-specific and tailored to further assist a particular user in meeting individual goals (col. 6, lines 23-29)

Riley also teaches a method in which the dietary supplement provides vitamins, minerals, and herbs. (Table 3) Riley does not expressly disclose that the dietary profile(s) also include(s) enzymes and amino acids, but does teach that the supplement profiles may include other dietary or nutritional compounds. (col. 21, lines 35-40; col. 22, lines 31-38) At the time of the Applicant's invention, it would have been obvious to one of ordinary skill in the art to further modify the system of Summerell in view of Riley to include amino acids and enzymes in the dietary supplement profile for an optimal health profile. As suggested by Riley, one would have been motivated to do this to further ensure adequate intake of nutrients needed for disease prevention and to

optimize wellness for individuals with varying lifestyle factors and states of health. (col. 7, lines 33-39; line 65-col. 8, line 9)

(B) The remaining amendments to claim 1 were apparently made to overcome the 112, 2nd paragraph issues set forth in the prior Office Action (Paper No. 3). However, these changes do not affect the scope and breadth of the claim as originally presented and/or interpreted by the Examiner when applying prior art within the previous Office Action (Paper No.3). As such, these limitations are rejected under the same rationale given in the previous Office Action, and incorporated herein.

(C) In reference to claims 2-3 and 5, the amendments to these claims were apparently made to overcome the 112, 2nd paragraph issues set forth in the prior Office Action (Paper No. 3). However, these changes do not affect the scope and breadth of the claim as originally presented and/or interpreted by the Examiner when applying prior art within the previous Office Action (Paper No.3). As such, these limitations are rejected under the same rationale given in the previous Office Action, and incorporated herein.

(D) Claim 4 has been amended to recite "a list of commercially available products that provide the dietary supplements listed in an optimal health profile." Summerell et al and Riley teach a method of claim 1 as explained in the rejection of claim 1. Furthermore, Summerell et al teaches a method that also includes generating a list of commercially available products that provide suggested dietary supplements. (Figures 24-25) In addition to providing nutritional recommendations, the output of the disclosed system also details which products (e.g. fruits, vegetables, artificial vitamin

supplements) provide the suggested nutrients. It is respectfully submitted the food products and artificial nutritional supplements are commercially available products and that the products included in the list provide nutrients that are included for an optimal health profile (e.g. vitamin C, vitamin E) (See also Riley, Table 3)

Response to Arguments

13. Applicant's arguments with respect to claim 1 have been considered but are moot in view of the new ground(s) of rejection.

The Examiner has applied a combination of references, Summerell et al in view of Riley, for the Applicant's consideration to address the newly recited claim limitations. The Applicant is respectfully reminded that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA, 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

14. Applicant's arguments filed 6/24/02 have been fully considered but they are not persuasive.

(A) On page 6, the Applicant argues that Summerell does not teach or suggest changes in an individual's dietary supplements to overcome risk factors.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., changes in an individual's dietary supplements to overcome risk factors) are not recited in the rejected claim(s). Although the claims are interpreted in light of the

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specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Furthermore, contrary to the Applicant's argument, Summerell does teach the use of dietary supplements to overcome risk factors. For instance, in Figures 23-25, the Recommendation Details for the user explain that the taking Vitamin C and Vitamin E reduce an individual's risk of various health problems.

(B) On page 6, the Applicant argues that no individual dietary supplement plan is taught or suggested in the recommendation.

In response, Summerrell does in fact teach the use of individual dietary supplements in the recommendation. For instance, in Figures 23-25, the Recommendation Details provide information on dietary supplements and are addressed to a specific individual user of the system (i.e. Bob Barker).

Remarks

15. It is called to applicant's attention that if a communication is deposited with the U.S. Postal Service and mailed to the Office by First Class Mail before the reply time has expired, applicant may submit the reply with a "Certificate of Mailing" which merely asserts that the reply is being mailed on a given date. So mailed, before the period for reply has expired, the reply may be considered timely. A suggested format for a certificate follows:

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to:

Assistant Commissioner for Patents
Washington, DC 20231
on _____(date).

Typed or printed name of person signing this certificate

Signature_____

Date_____

16. Applicant is also advised to review information regarding the patent process on the Patent's Office's website: www.uspto.gov. In addition to being able to download a copy of the Manual of Patent Examining Procedure (MPEP), the Applicant may also access required forms and useful information regarding fees and patent prosecution.

Conclusion

17. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

- Bell et al (US Patent No. 6,210,686) disclose a dietary supplement formulated to lower one's risk of heart disease.

18. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

19. This action is a **final rejection** and is intended to close the prosecution of this application. Applicant's reply under 37 CFR 1.113 to this action is limited either to an appeal to the Board of Patent Appeals and Interferences or to an amendment complying with the requirements set forth below.

If applicant should desire to appeal any rejection made by the examiner, a Notice of Appeal must be filed within the period for reply identifying the rejected claim or claims appealed. The Notice of Appeal must be accompanied by the required appeal fee of \$320.00 or (\$160.00 for Small Entity).

If applicant should desire to file an amendment, entry of a proposed amendment after final rejection cannot be made as a matter of right unless it merely cancels claims or complies with a formal requirement made earlier. Amendments touching the merits of the application which otherwise might not be proper may be admitted upon a showing a good and sufficient reasons why they are necessary and why they were not presented earlier.

A reply under 37 CFR 1.113 to a final rejection must include the appeal from, or cancellation of, each rejected claim. The filing of an amendment after final rejection, whether or not it is entered, does not stop the running of the statutory period for reply to the final rejection unless the examiner holds the claims to be in condition for allowance. Accordingly, if a Notice of Appeal has not been filed properly within the period for reply,

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or any extension of this period obtained under either 37 CFR 1.136(a) or (b), the application will become abandoned.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Rachel L. Porter whose telephone number is 703-305-0108. The examiner can normally be reached on M-F, 9:30-6:00.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Joseph Thomas can be reached on (703)305-9588. The fax phone numbers for the organization where this application or proceeding is assigned are (703)305-7687 for regular communications and (703)305-7687 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)308-1113.

RP

RP

August 29, 2002

~~JOSEPH THOMAS~~
~~SUPERVISORY PATENT EXAMINER~~

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